IN THE

Supreme Court of the United States

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CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1940.

No. 590.

JAMES UTLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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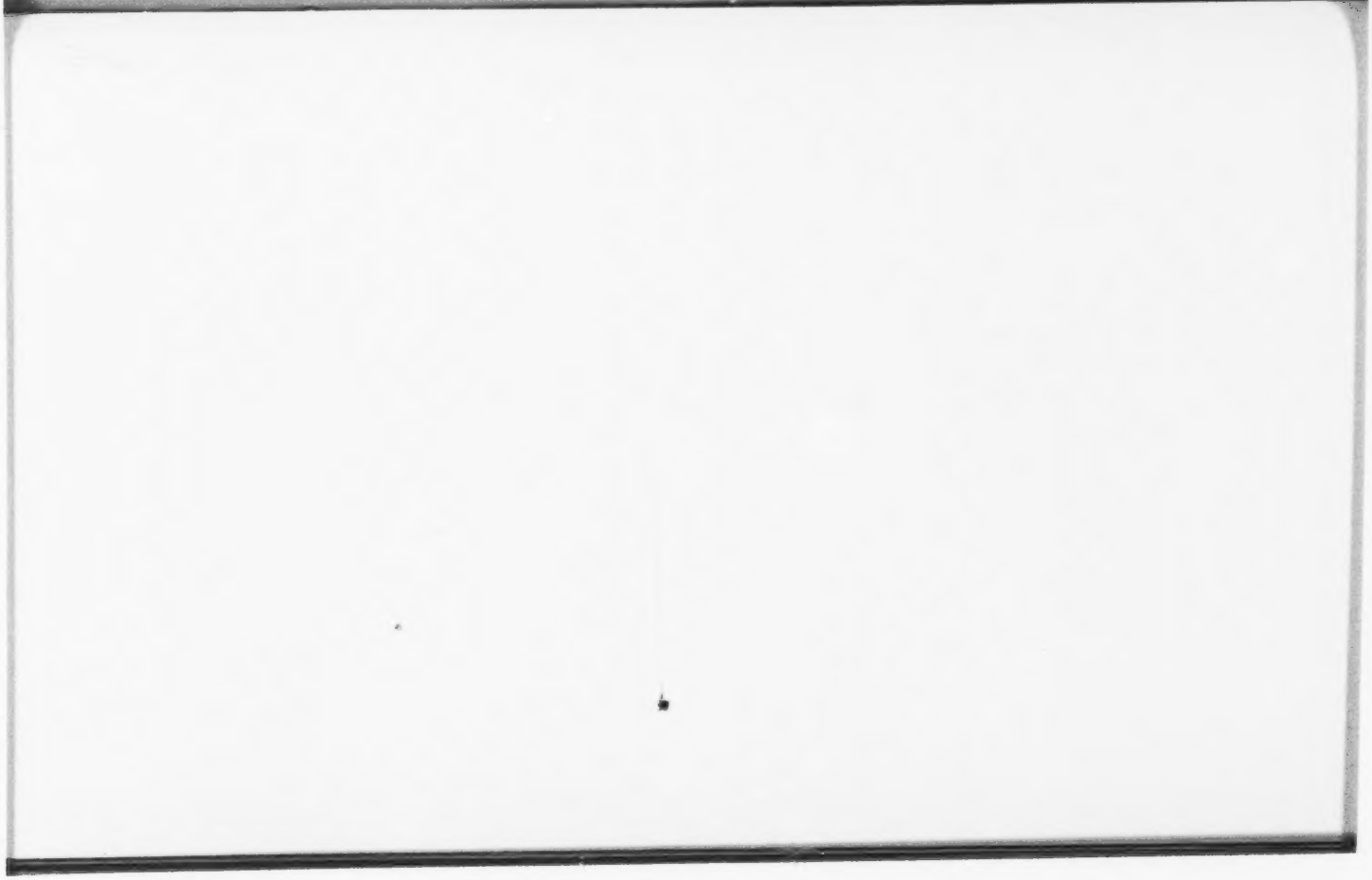

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JAMES UTLEY,

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UNITED STATES OF AMERICA,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is set out in the appendix to the petition for writ of certiorari, heretofore docketed on the 22nd day of November, 1940, and is part of the certified transcript of record, previously filed in this Court, to be found on pages 284 to 288 thereof.

II.
Jurisdiction.

1. STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 247 of Title 28 of the United States Code to review any criminal case pending or decided by the Circuit Court of Appeals.

2. FINALITY OF JUDGMENT.

The judgment forming the basis of petition is final, the Court below having caused to be filed its opinion and judgment in affirmance, albeit it is not conceded by petitioner that said Court endeavored to dispose of any of the errors in controversy assigned to the trial court below.* Your petitioner deferentially interposes that the Honorable Circuit Court arbitrarily declined to review the errors assigned on hyper-technical grounds.

3. PETITION TIMELY FILED.

The final judgment of the United States Circuit Court of Appeals for the Ninth Circuit was filed October 25, 1940 [R. 288], under Section 723(a) of Title 28, U. S. C., and Rule 11 of the general rules of this Court in criminal cases. Petition to review judgment of an appellate court may be made within thirty days after the entry of the judgment in that court.

4. STATEMENT OF THE CASE.

A summary statement of the case has been given under the heading "Summary Statement of the Facts Involved," page 3 *et seq.* of the petition for writ of certiorari, and is not repeated at this point.

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*Attention is respectfully directed to the Opinion in the Appendix to Petition for Writ of Certiorari.

III.

Issues Involved.

1. Before the Circuit Court of Appeals for the Ninth Circuit petitioner urged that the case against him rested in its entirety on two intercepted telephone communications between a witness not produced at the trial and your petitioner.

As applied to him, your petitioner contends that the Circuit Court of Appeals failed to recognize and comment on, or decide on this question, notwithstanding that the cases of this Court and a Circuit Court decision were both submitted in the briefs presented and in the oral argument in relation thereto.*

2. It is contended by the petitioner that the indictment, upon which he was brought to trial, fails to conform in the matter of allegations and substance to the foundational requirements of constitutional amendments 5 and 6 to the United States Constitution, and that the position taken by the Ninth Circuit Court of Appeals in relation thereto is in sharp conflict with the decisions of other jurisdictions.[1]

3. The petitioner contends that in the instant case sought to be reviewed, the Government has sought to carve out of a single transaction two causes upon which double punishment has been imposed upon your petitioner.

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*_Nordone v. United States_, 302 U. S. 379; 308 U. S. 338;
Weiss v. United States, 308 U. S. 321;
United States v. Polakoff, et al., 112 Fed. (2d) 888, 889.

[1]See p. 5, Petition for Writ of Certiorari heretofore filed.

4. Petitioner, in the instant case, presents for examination and consideration by this Honorable Court an important question not heretofore decided, in so far as petitioner can ascertain, by this, or any Circuit Court in the United States, namely, the question as to the right of trial counsel to waive admitted prejudicial error:

(a) In any instance; and

(b) In the absence of consent by the defendant personally.

5. The final question presented by petitioner is the query whether a Circuit Court of Appeals may properly refuse to consider manifest prejudicial error involving the defendant's constitutional, fundamental and substantial rights because, in its opinion, the record has not been preserved with a particularity interpreted to be requisite before such errors will be considered or decided, notwithstanding that on authorities of this Court, the errors were flagrant and manifest and that the objections interposed were sufficient in substance, but not, perhaps, in form to induce the tribunal whose opinion it is sought to review, as indeed it did, to consider petitioner's appeal on the merits.*

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*See Opinion in Appendix of Petition for Writ of Certiorari.

ARGUMENT.

What the petitioner requests the Court to consider here is not a question of conflict of evidence, but whether the evidence upon which the judgments are grounded:

(a) Was received competently on authorities of this Court;[2] and

(b) Whether petitioner received that fair and impartial trial presumed to be secured under the laws of the United States, and whether petitioner's constitutional rights were indeed jeopardized on the altar of arbitrary construction of appellate court rules, in disregard of a patent reception of evidence, previously held to be inadmissible by this Court, and refusal to consider errors heretofore deemed sufficient for reversal because of failure of trial counsel to adhere to form in lieu of substance in his presentment of petitioner's cause in the appellate tribunal.

Argument on Point 1 of Issues Involved.

Petitioner, in the Circuit Court, urged that the case against him rested entirely on two intercepted telephone conversations, as related in "Brief Statement of Facts," pages 7 to 10 of petition, which indisputably is a fact which cannot be controverted. The decisions of this Court, to-wit, *Nordone v. United States*, 302 U. S. 379, 308 U. S. 338; *Weiss v. United States*, 308 U. S. 321, together with the case of *United States v. Polakoff et al.*, 112 Fed. (2d) 888, at page 889, were presented and argued, but the opin-

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[2]*Nordone v. United States, supra;*
Weiss v. United States, supra.

ion of the Circuit Court of Appeals [R. 284-288] does not answer the question; in fact, the question is entirely ignored. However, by necessary intendment, said decision is contrary to the holdings of this Court and the Circuit Court opinion in *United States v. Polakoff, supra.*

The statement of facts and the evidence do clearly show that Section 605 of the Federal Communications Act, providing that no person, not being authorized by the sender, shall intercept any communication, and divulge or publish the existence, contents, substance, purport or effect or meaning of such intercepted communication to any person, has been violated in connection with the case of your petitioner, in that the entire case of the Government rests upon the interception of two telephone conversations allegedly between your petitioner and a witness not produced at the trial. Since the sender, in this case, of the communication upon which the Government rested its case, was your petitioner, who did not consent to the divulgence of the matters testified to at the trial, the evidence of the purported telephonic conversations was erroneously admitted in contravention of the declared legal concepts embraced by the Fourth and Fifth Amendments to the Constitution of the United States and Section 605 of the Federal Communications Act, and since the provisos aforementioned forbid the acquisition of evidence in that particular way, and proscribe its use at all,[3] the facts of the instant case, as supported by the record, establish that the Government's case against your petitioner is supported solely by the fruits of the legally poisonous tree.[4]

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[3]*Silverthorne Company v. United States,* 251 U. S. 385, 392.

[4]*Nordone v. United States, supra.*

Argument on Point 2 of Issues Involved.

Petitioner heretofore, in his application for writ of certiorari, set forth by apt reference to the record that even the statutory provisos were not followed in the indictment, affording your petitioner the rights secured by the Sixth Amendment.[5]

Petitioner contends that he was entitled to be informed of the nature and cause of the accusation in order to afford him the opportunity of making his defense with some degree of particularity, if for no other reason than to enable him to plead former jeopardy in case he should thereafter be indicted for the same offense.

The indictment [R. 1 to 3] is totally lacking in this requirement on authority of *Boykin v. United States, supra;*[5] *Myers v. United States,* 15 Fed. (2d) 987; *Fontana v. United States,* 262 Fed. 283, and *Bratton v. United States,* 73 Fed. (2d) 798.

Since the demurrer in the case of your petitioner [R. 4-7] was overruled and the ruling of the Circuit Court of Appeals for the Ninth Circuit is in sharp and direct conflict with the Fifth, Eighth and Tenth Circuits, as reflected in the Table of Specific Circuits, showing a conflict, as appears on page 5 of the petition for writ of certiorari herein, petitioner contends that said conflict calls for clarification and authoritative determination by this Court.

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[5]*Boykin v. United States,* 11 Fed. (2d) 484.

Argument on Point 3 of Issues Involved.

Petitioner has heretofore submitted that the Government sought to and indeed succeeded in carving two causes out of a single alleged offense upon which a double punishment has been imposed upon your petitioner. [R. 27, 28.]

Petitioner contends that while a general or gross sentence may be imposed on a verdict of guilty on an indictment containing several counts, providing it does not exceed the aggregate of punishments which could have been imposed upon a single count, the rule has been violated in the case of this petitioner, and the sentences imposed exceed the limits imposed by the Act of Congress, and such sentence therefore is void on authority of *Ex parte Lange,* 18 Wall., 85 U. S. 163, 21 L. Ed. 872, and the sentences imposed upon your petitioner violated the constitutional guarantee against double punishment for the reason that a second punishment is attempted to be inflicted for the same offense by a judicial sentence.

The opinion of the Circuit Court of Appeals [R. 284-288] does not answer this question, but essays to merely declare that the assignments are *too general,* and fails to reconcile its position to that taken in the case of *Copperwaithe v. United States,* 37 Fed. (2) 846, at 847, which opinion holds that the Government may punish for either offense, *i. e.,* violation of Title 21, U. S. C. A., Section 174 or Section 2553(a) of the Internal Revenue Code, but cannot mete out a double punishment for a single continuous transaction.

There exists a sharp conflict between the holding in the Circuit Court of Appeals for the Ninth Circuit and the *Copperwaithe* case, cited *supra,* as well as the cases of *Duffy v. Hudspeth,* 112 Fed. (2d) 559, and *Caballera v.*

Hudspeth, 114 Fed. (2d) 554. The following cases, which conflict,[6] call for clarification and authoritative determination by this Court.

Argument on Point 4 of Issues Involved.

In respect to the question raised by the petitioner concerning the right of counsel for an accused to waive prejudicial error, which the Court on its own motion characterized *as necessarily calling for a mistrial* [R. 81 to 88], it should be noted that after the trial court had declared there was nothing to do but declare a mistrial, that counsel suggested that the jury be admonished to disregard the matter and withdrew the assignment. However, petitioner, as the record will reflect, did not join in this request, or personally consent to a waiver of this error.

In the case of *United States v. Newman,* 25 Fed. (2d) 357, a case arising in the District of Columbia, cited as authority on this question, it was held that it does not lie within the power of counsel to waive an error to the prejudice of his client. Extensive research discloses a total absence of any expression of authority on this question, other than the *Newman* case, cited *supra.* The subject, in general, is discussed in *Corpus Juris Secundum,* Volume 7, Section 100c, pp. 922-923, wherein the text presents the general statement in the following form:

> "In the absence of express authority, an attorney generally has no power, by stipulation, agreement, or

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[6] *Miller v. United States,* 300 Fed. 529;
Perez v. United States, 10 Fed. (2d) 352;
Foster v. United States, 11 Fed. (2d) 100;
O'Brien v. United States, 51 Fed. (2d) 192;
Ex Parte Farlow, 272 Fed. 910.

> otherwise, to waive or surrender the substantial legal rights of his client . . . that an attorney has no right to surrender a right of his client so substantial as the right of appeal, unless authority to do so has been expressly conferred, and that he cannot waive error of the court to the prejudice of his client."

A fortiori, if an attorney may not waive the right to appeal, can he waive admitted prejudicial error, after the trial court has, on its own motion, declared the assignment of such prejudicial misconduct, as calling for a mistrial. It appears that this question is of sufficient import to call for a clarification and authoritative determination by this Court of this important, fundamental right by applicable expression by this Court.

The opinion of the Circuit Court of Appeals for the Ninth Circuit does not answer this question, but in fact, erroneously declares that the record shows that the question was not objected to, whereas the record in fact shows a series of objections and exceptions [pp. 80, 82-83]. However, it is important to note that the question under discussion, treated in the opinion as Assignment No. 11, disposes of this point on the theory that *"appellant"* having brought about this result, namely, the withdrawal of the assignment of misconduct, "cannot be heard to complain of it."

It is apparent that the Circuit Court of Appeals takes the position that petitioner's counsel at the trial had the *implied authority* to waive admitted prejudicial misconduct. It is this aspect of the question which petitioner contends deserves the attention of this Court.

In *Ray v. United States,* 114 Fed. (2d) 508, at page 511, it was declared:

> "Where prejudicial error is obvious in a criminal case, appellate courts *should* of their own motion recognize it, and give protection against wrongful conviction." (Citing cases.[7])

Argument on Point 5 of Issues Involved.

In an endeavor to avoid the raising of too many general legal questions, petitioner has presented a question involving the propriety of the Circuit Court declining to consider a multitude of manifestly prejudicial errors on purely super-technical grounds.

As heretofore urged, on authority of *Ray v. United States, supra,* it is petitioner's contention that prejudicial error, where obvious, should be recognized by the appellate tribunal.

The opinion of the Circuit Court of Appeals unquestionably reflects a disinclination to consider a multitude of assignments of error presented to said tribunal by your petitioner, and in some instances, on the alleged ground that he did not apparently comply with the rules or regulations of said Court; this in total disregard of the fundamental fact that it is not anywhere denied in said opinion that the errors complained of are *substantial;* and, in truth and in fact, deprive your petitioner of that fair and impartial trial guaranteed by the laws of these United States.

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[7]*Booth v. United States,* 10th Circuit, 57 Fed. (2d) 182, and *Elderd v. United States,* 4th Circuit, 44 Fed. (2d) 170.

There are only two authorities cited in the opinion; the one primarily relied upon is the case of *Waggoner v. United States,* its own opinion, reported in 113 Fed. (2d) 867. Petitioner respectfully, but nevertheless deferentially, suggests that this Honorable Court *read this authority.* Petitioner frankly concedes that the said citation is authority for the refusal of the Court below to consider, if it chooses, any and all questions urged as grounds for reversal, so long as said Court, in its opinion, feels that appellant has not complied with its construction of its requirements.

It is respectfully submitted by petitioner that the *Waggoner* case, *supra,* and the opinion in this case, should definitely *not be recognized as authority* exemplifying an approved manner in which appellate tribunals should regard and consider causes presented for review on appeal, especially so where the law enunciated by this Court shows that errors committed at the trial call for reversal.[8]

It is petitioner's view that inquiry must always be as to whether, in view of the whole record, the appellate tribunal may fairly conclude that there has not been a miscarriage of justice.[9]

This Court, in its decision in the case of *United States v. Atkinson,* 297 U. S. 157, enunciated that appellate courts in the public interest may of their own motion note errors to which even no exception has been taken, where the errors are obvious.

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[8]*Nordone v. United States, supra;*
Weiss v. United States, supra.

[9]*Moore v. United States,* 224 Fed. 95;
Sykes v. United States, 204 Fed. 909.

This doctrine has been re-enunciated in the case of *United States v. White,* 77 Fed. (2d) 757, and in the text of Marker on Federal Appellate Jurisdiction, etc., page 151, paragraph 97, where it is enunciated that "where life or liberty is involved, the appellate court does not require the strict compliance insisted on in a civil case. If it appears from the whole record that there has been a miscarriage of justice, a reversal will be ordered, even though there is no proper bill of exceptions in the record on appeal," citing *Moore v. United States,* 224 Fed. 95. See, also, the pronouncements in other courts,[10] and see the reasons, as set forth by Mr. Justice Stone, in the case of *New York Central Ry. v. Johnson,* 279 U. S. 310.

Petitioner, in his argument on the previous point, has alluded to an incident which the trial court characterized as sufficiently prejudicial to call for a mistrial. One of the important points urged in the Court below was the misconduct of Government counsel in deliberately reiterating with special emphasis the matters which the trial court in the early phase of the trial characterized as prejudicial and calling for a mistrial.[11]

It will be noted that the conclusion is inescapable that the Government counsel's attention had been manifestly called to the prejudicial character of these matters, yet the opinion of the Court below declined to regard or consider this error because of the failure of trial counsel to uselessly suggest to the trial court that counsel be *readmonished* to not refer to this acknowledged prejudicial matter.

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[10]*Pierce v. United States,* 86 Fed. (2d) 949; 28 U.S.C.A. Sec. 391; *Berger v. United States,* 295 U. S. 78; *Crawford v. United States,* 212 U. S. 183.

[11]Argument on p. 4 of Issues Involved, *infra.*

Petitioner takes the view that there is ample authority that a readmonishment was not jurisdictionally requisite in order to require an appellate tribunal to take cognizance of an attempt by Government counsel to appeal to the prejudice of the jury.[12]

In conclusion, there are two additional observations under this general topic, which Petitioner respectfully suggests that the opinion of the Court below does not answer, namely, the contention that the trial court should have granted the instructions requested after the jury returned, in the manner reflected in the statement of facts.*

Petitioner believes that the pronouncement in *Berger v. United States,* 62 Fed. Rep. (2d) 438, at page 440, that such charges are calculated to prevent the jury from wrongfully being coerced into arriving at a verdict is a correct pronouncement of law, and that the trial court's inquiry put to the jury for the purpose of ascertaining the extent of its division numerically in the manner reflected by the record, pages 232 to 234, on authority of this Court, to-wit, *Brasfield v. United States,* 272 U. S. 448, was *per se* sufficient to require a reversal of the judgments sought to be reviewed by the Circuit Court below.

It is therefore plain that the course of the proceedings of the case at bar was not legally sound nor just to your petitioner, and not in conformity with due process of law, as recognized by this tribunal.

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[12]*Berger v. United States, supra;*
Pharr v. United States, 48 Fed. (2d) 767;
Volkner v. United States, 13 Fed. (2d) 594;
New York Central Ry. v. Johnson, supra;
DeBonis v. United States, 54 Fed. (2d) 3.

*Petition for Writ of Certiorari, p. 12.

Wherefore, because of the gravity and importance of the questions involved, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, demanding them, and each of them, to certify and send to this Court, on a day certain to be designated, a full and complete transcript of the record and proceedings in said Circuit Court of Appeals in the said case lately pending therein entitled, "James Utley, Appellant, vs. United States of America, Appellee," No. 9370, to the end that the decision and judgment of said Circuit Court of Appeals may be reviewed, as provided in 28 U. S. C., Section 347, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the decisions and the judgments of said Circuit Court of Appeals and of the United States District Court, in and for the Southern District of California, Central Division, in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner now presents as an exhibit to his petition a certified copy of the entire transcript of record of the case, including the proceedings in the United States Circuit Court of Appeals for the Ninth Circuit, to which Court he prays the writ of certiorari may be directed, and your petitioner will ever pray.

Dated at Los Angeles, California, November 26, 1940.

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